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No. 90-653

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

JUDYBILL OSCEOLA, at al.,

Petitioners,

v.

FLORIDA DEPARTMENT OF REVENUE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO THE
PETITION FOR WRIT OF CERTIORARI

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
STATE OF FLORIDA
JOSEPH C. MELLICHAMP, III
SENIOR ASSISTANT ATTORNEY GENERAL
ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)
Office of the Attorney General
The Capitol
Tallahassee, Florida 32399-1050
(904) 487-2142

Attorneys for Respondent,
Florida Department of Revenue

QUESTION PRESENTED

Was the decision by both the District Court and the Court of Appeals that the Tax Injunction Act, 28 U.S.C. Section 1341, barred individual Indians, as opposed to a recognized tribal authority, from bringing a lawsuit in a federal court challenging the constitutionality of a state's sales tax correct and not in conflict with the decisions of this Court and the other courts of appeal? Al/

Al/ The Petitioner presents a number of "Questions Presented." However, a number of those listed by the Petitioners were either not raised by the Petitioners below (Question #3, see, 705 F.Supp. 1552, 1553 (S.D. Fla. 1989) or not addressed by the Court of Appeals in its final decision (Question #'s 1, 4 and 6, see, 893 F.2d 1231, 1232 n.1 (11th Cir. 1990)).

PARTIES TO THE PROCEEDINGS BELOW

In addition to the parties listed by the Petitioners in their Petition, the Florida Department of Revenue was also a party to the proceedings below.

TABLE OF CONTENTS

QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	v
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE GRANT	4
THE DECISION BELOW IS NOT IN CONFLICT WITH THE DECISIONS OF THIS COURT OR OTHER COURTS OF APPEAL ON THE APPLICATION OF THE TAX INJUNCTION ACT, 28 U.S.C SECTION 1341, TO INDIVIDUAL INDIANS	6
1. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN <u>MOE v. CONFEDERATED SALISH & KOOTENAI TRIBES</u> , 415 U.S. 463 (1976)	11

2. THE DECISION OF THE
COURT OF APPEALS IS NOT
IN CONFLICT WITH THE
DECISION IN OMAHA TRIBE OF
INDIANS V. PETERS CONCLUSION

24

CONCLUSION

33

TABLE OF AUTHORITIES

CASES:

<u>Agua Caliente Band v.</u> <u>County of Riverside,</u> 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972)	26, 28
<u>Bryan v. Itasca County,</u> 426 U.S. 373 (1976)	24
<u>City of Detroit v.</u> <u>Murray Corp.,</u> 355 U.S. 489 (1958)	18
<u>Comenout v. State</u> <u>of Washington,</u> 722 F.2d 574 (9th Cir. 1983)	32
<u>Department of Employment</u> <u>v. United States,</u> 385 U.S. 355 (1966)	10, 13- 14
<u>Dillon v. State of Montana,</u> 634 F.2d 463 (9th Cir. 1980)	31-32

<u>Dodge v. United States,</u> <u>362 F.2d 810 (Ct.Cl. 1966)</u>	25
<u>James v. Dravo Contracting Co.,</u> <u>302 U.S. 134 (1937)</u>	13, 19
<u>McCulloch v. Maryland,</u> <u>17 U.S. (4 Wheat.) 316 (1819)</u>	12
<u>Mescalero Apache Tribe</u> <u>v. Jones,</u> <u>411 U.S. 145 (1973)</u>	20-21
<u>Metcalf & Eddy v.</u> <u>Mitchell,</u> <u>269 U.S. 514 (1926)</u>	19
<u>Moe v. Confederated</u> <u>Salish & Kootenai Tribes,</u> <u>425 U.S. 463 (1976)</u>	7, 10, 20-24
<u>Moses v. Kinyear,</u> <u>490 F.2d 21 (9th Cir. 1974)</u>	26, 28, 29
<u>Navajo Tribal Utility v.</u> <u>Arizona Department of Revenue,</u> <u>608 F.2d 1228 (9th Cir. 1979)</u>	29-31

Omaha Tribe of Indians
v. Peters,
516 F.2d 133 (8th Cir. 1975),
vacated and remanded,
427 U.S. 902 (1976) 7, 24-28

Oneida Indian Nation of New
York v. State of New York,
691 F.2d 1070 (2nd Cir. 1982) 10

Osceola v. Florida
Department of Revenue,
893 F.2d 1231 (11th Cir. 1990) 1, 8-9

Osceola v. Florida
Department of Revenue,
705 F.Supp. 1552
(S.D. Fla. 1989) 1

Quinault Tribe of Indians
v. Gallagher,
368 F.2d 648 (9th Cir. 1966) 29

Standard Oil Co. v. Johnson,
316 U.S. 481 (1942) 19

United States v. Bureau of
Revenue of the State of
New Mexico,
291 F.2d 677 (10th Cir. 1961) 12

<u>United States v. New Mexico,</u> 455 U.S. 720 (1982)	15-19
<u>Wardle v. Northwest</u> <u>Investment Co.,</u> 830 F.2d 118 (8th Cir 1987)	32.
<u>Weston v. City Council</u> <u>of Charleston,</u> 27 U.S. (2 Pet.) 449 (1829)	12, 18
CONSTITUTION:	
Article VI, Clause 2	13
STATUTES AND RULES:	
Tax Injunction Act, 28 U.S.C. Section 1341	passim
28 U.S.C. Section 1362	passim
OTHER	
R. Stern, E. Gressman & S. Shapiro, <u>Supreme Court</u> <u>Practice, Section 4.3</u> (6th ed. 1986)	6

STATEMENT OF THE CASE

This case was originally filed in the United States District Court for the Southern District of Florida on July 7, 1988. The Petitioners, individual members of the Seminole Indian Tribe in Florida, alleged that the State of Florida illegally collected sales taxes from them when the individual Indians purchased, from off-reservation commercial enterprises, retail goods and materials such as automobiles. The Petitioners sought a refund for all sales taxes collected by the State since 1956 and an injunction against the State from collecting sales taxes from the individual Indians in all future sales transactions.

The Florida Department of Revenue responded to the Petitioners' complaint by filing a motion to dismiss. The State argued that the case was barred by the Tax Injunction Act, 28 U.S.C. Section 1341, and the Eleventh Amendment to the United States Constitution.

The district court ruled that the Petitioners were barred by the Tax Injunction Act and the Eleventh Amendment from bringing their action in federal court. The court rejected the Petitioners' federal instrumentality/co-plaintiff argument as well as the Petitioners' assertion of jurisdiction under 28 U.S.C. Section 1362.

The Petitioner appealed the case to the Eleventh Circuit Court of Appeals.

The Court of Appeals restricted its decision to the Tax Injunction Act issue and affirmed the decision of the dictrict court.

REASONS FOR DENYING THE WRIT

The Petitioners do not present any grounds for granting certiorari as set forth in Rule 10 of the Rules of this Court. Respondent respectfully submits that the Petition be denied.

The essence of the Petitioners' argument is that the decision of the Eleventh Circuit Court of Appeals, ruling that the Tax Injunction Act, 28 U.S.C. Section 1341, barred individual Indians from bringing a lawsuit in a federal court to challenge a state tax or the state's taxing authority, is in conflict with decisions of this Court and other courts

of appeals. 1/

Respondent submits a review of the cases cited by the Petitioners reveal no conflict on this issue, or, if there does exist some conflict, the conflict is not substantial and is not of the type to make this case deserving of review. The Respondent would thus assert that the decision below is consistent with other

1/ The Petitioners have raised a number of issues in their Petition for Writ of Certiorari. While a number of these issues were also presented to the Court of Appeals by the Petitioners, the Court of Appeals decided the case before them solely on their interpretation of the Tax Injunction Act and did not address any of the other issues raised by the Petitioners in the case below. See, 893 F.2d 1231, 1232 n.1 (11th Cir. 1990). Thus, those issues presented to this Court by the Petitioners, other than those related to the Tax Injunction Act, are improperly raised and will not be addressed by the Respondent in this Brief.

decisions addressing the state tax issues raised by individual Indians rather than a tribal authority.

THE DECISION BELOW IS NOT IN CONFLICT
WITH THE DECISIONS OF THIS COURT OR
OTHER COURTS OF APPEAL ON THE
APPLICATION OF THE TAX INJUNCTION ACT,
28 U.S.C SECTION 1341, TO
INDIVIDUAL INDIANS

In order to warrant a writ, there must be a "real or 'intolerable' conflict on the same matter of law or fact, and [not] merely an inconsistency in dicta. . . ." R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice Section 4.3 (6th ed. 1986).

There are two asserted conflicts presented by the Petitioners. The first arises principally from a footnote in this

Court's decision in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463 (1976) discussing the district court's finding of jurisdiction for individual Indians in that case. However, as will be detailed later, the issue presented here was not before this Court in the Moe case, nor was there a considered discussion of federal court jurisdiction in cases brought by individual Indians.

Secondly, the Petitioners assert that the Eighth Circuit Court of Appeal's decision in Omaha Tribe of Indians v. Peters, 516 F.2d 133 (8th Cir. 1975), vacated and remanded, 427 U.S. 902 (1976) is in conflict with the opinion below. However, there was no reasoned discussion in Peters of the issue presented here and

any statements made by the Eighth Circuit, that could be attributed to the issue before this Court, was at best dictum.

A review of the decision below, Judybill Osceola v. Florida Department of Revenue, 893 F.2d 1231 (11th Cir. 1990), shows that the Court of Appeals reached its conclusion, that an individual Indian cannot use 28 U.S.C. Section 1362 to avoid the Tax Injunction Act, as follows:

1. The Tax Injunction Act limits the jurisdiction of a federal court to entertain an action challenging a state tax, whether the party seeks declaratory, injunctive or refund relief. (893 F.2d at 1232-33);

2. Florida provides the "plain, speedy and efficient remedy" required by the Tax Injunction Act. (893 F.2d at 1233);

3. The only exception to the Tax Injunction Act then available to the Appellants/Indians was the "federal instrumentality" doctrine. (893 F.2d

at 1233);

4. Under the instrumentality exception, the Tax Injunction Act does not prevent the United States from bringing an action against a state in federal court. (893 F.2d at 1233);

5. Under 28 U.S.C. Section 1362, Congress permitted the United States to bring an action on behalf of a tribe as a trustee. (893 F.2d at 1234); and

6. Therefore concluding that under the federal instrumentality doctrine only Indian tribes could use Section 1362 to avoid the Tax Injunction Act. (893 F.2d at 1234).

Based upon the conclusion of its analysis, the Court of Appeals ruled that individual Indians could not rely upon the federal instrumentality doctrine or Section 1362 to avoid the dictates of the Tax Injunction Act. Id., 893 F.2d at 1235.

What is not at issue before the Court is the question of the Tax Injunction Act's effect on the United States. Respondent concedes that if the United States or an instrumentality of the United States was to question a state tax, the Tax Injunction Act would not bar the action in a federal court. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 470 (1976). See also, Department of Employment v. United States, 385 U.S. 355, 358 (1966). Furthermore, Respondent concedes that Congress has abrogated a state's immunity in 28 U.S.C. Section 1362 when an action is brought by an Indian tribe. Moe, 425 U.S. at 472-475. See also, Oneida Indian Nation of New York v. State of New York, 691 F.2d

1070, 1079 (2nd Cir. 1982).

The only issue before the Court is the question whether an "individual" Indian can use Section 1362, or the "federal instrumentality" doctrine to avoid the Congressional prohibition of the Tax Injunction Act, when the individual Indian initiates a suit in a federal court challenging a state tax.

1. THE COURT OF APPEALS' DECISION IS NOT IN CONFLICT WITH THIS COURT'S DECISION IN MOE v. CONFEDERATED SALISH & KOOTENAI TRIBES, 415 U.S. 463 (1976)

The federal instrumentality exception (earlier known as the intergovernmental instrumentality doctrine), had its genesis in the policy that no state should be permitted to impose a tax on the United

States or one of its agencies or instrumentalities. See, McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819) [no state taxation on the Second National Bank of the United States]. This protected the property and assets of the Federal Government. See, Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449, 467 (1829) [state taxation cannot fall on an "operation essential to the important objects for which the government was created."]. The real party in interest was not the federal agency or the "federal instrumentality," but the United States itself. See, United States v. Bureau of Revenue of the State of New Mexico, 291 F.2d 677, 678-79 (10th Cir. 1961).

The end result of the Supremacy Clause is that the Federal Government is "immune" from state taxation. If a state tax was imposed, a federal instrumentality would assert the Federal Government's immunity and any right the instrumentality would have would be a "derivative one." James v. Dravo Contracting Co., 302 U.S. 134, 158 (1937).

This Supreme Court began to mold the modern day definition of "federal instrumentality" and the instrumentality's immunity from state taxation in the case of Department of Employment v. United States, 385 U.S. 355 (1966). At issue there was the legal status of the American Red Cross and whether it was a federal instrumentality. Colorado asserted the

Red Cross was not a federal instrumentality and, thus, not immune from state taxation. In its examination, the Supreme Court found that the Red Cross was a congressionally chartered organization, subject to government supervision and auditing, with its principal head and officers chosen by the President of the United States. Id., 385 U.S. at 359. The Court noted the Red Cross aided the United States in its legal obligations, provided services to our armed forces throughout the world and provided assistance in the United States in times of disaster. Id., 355 U.S. at 359. The Court concluded that the Red Cross was an instrumentality because it was virtually "an arm of the Government." Id., 385 U.S. at 359-60.

Since that decision, the courts have interpreted the "instrumentality" doctrine narrowly. 2/ This Court revisited the instrumentality doctrine in United States v. New Mexico, 455 U.S. 720 (1982). In that case the Court was faced with various New Mexico taxes placed on contractors who had business relations with the federal government and who used federal property at the atomic energy operations in New Mexico. The contractors sought refuge from the state taxes claiming that they were covered by the federal instrumentality doctrine. The United States brought an action seeking a declaratory judgment that

2/ For a history of the instrumentality doctrine and its expansion and contraction by the Supreme Court, see United States v. New Mexico, 455 U.S. 720, 728-733 (1982).

the contractors were not subject to New Mexico's taxes. Id., 455 U.S. at 728.

Starting with the basic precept of the Supremacy Clause, Article VI, clause 2, of the United States Constitution that a state may not lay a tax "directly upon the United States," the Court revisited the extent to which a state may constitutionally impose a tax upon federal activities, agencies or instrumentalities. Id., 455 U.S. at 733-34. The Court specifically found that it was permissible for a state to lay a tax upon a contractor providing goods to the Federal Government, even when the Federal Government reimburses the contractor for such a cost; on the earnings of a contractor providing services to the federal government; or a

use tax upon federal property in the hands of private persons, even when the private party is using that federal property to provide goods to the federal government.

The Court focused upon the actual relationship between the contractor/instrumentality and the United States. The Court specifically held that immunity from state taxation under the constitution was appropriate only in one circumstance:

when the levy falls on the United States itself, or on an agency or instrumentality so closely connected to the Government that the two cannot be realistically be viewed as separate entities . . .
(emphasis supplied)

Id., 455 U.S. at 735. This narrow interpretation of the instrumentality

doctrine was consistent with their earlier decision of City of Detroit v. Murray Corp., 355 U.S. 489, 504-05 (1958) (opinion of Frankfurter, J.), approving the concept of disallowing "direct" taxation upon the Federal Government. 3/ Id., 355 U.S. at 504-05. Finally, the New Mexico Court summed up the limits of the immunity by reaffirming the words of City of Detroit v. Murray Corp., 355 U.S. at 503, that for a private taxpayer, an instrumentality, to be immune from state taxing power, the "private taxpayer must

3/ This position is also historically consistent with prior pronouncements of the Court such as in Weston v. City Council of Charleston, 27 U.S. (2 Pet.) 449, 467 (1829), where the Court stated that state taxation cannot fall on an "operation essential to the important objects for which the government was created."

actually 'stand in the Government's shoes'." United States v. New Mexico, 455 U.S. at 736. 4/ Thus state tax immunity is limited "only to entities that have been 'incorporated into the government structure'." Id., 455 U.S. at 737.

4/ The Court also noted other statements of the standard to be used in finding an instrumentality such as

so intimately connected with the exercise of a power or the performance of a duty [that taxation would be] a direct interference with the function of government itself.

(citing James v. Dravo Contracting Co., 302 U.S. 134, 157 (1937) quoting Metcalf & Eddy v. Mitchell, 269 U.S. 514, 524 (1926)); and "Integral parts of [a government department]" and "arms of the Government deemed by it essential for the performance of governmental functions" citing Standard Oil Co. v. Johnson, 316 U.S. 481, 485 (1942). United States v. New Mexico, 455 U.S. at 736-37.

This Court again addressed the application of the instrumentality doctrine as it applies to Indians, in Moe. After reciting the Court's past history of the instrumentality doctrine, the Court specifically rejected the instrumentality theory as a defense for the Indian tribes. Moe, 425 U.S. at 471-72.

As this Court noted in Moe, in Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973), the Court began the rejection of the instrumentality doctrine by finding that off-reservation business enterprises were not "virtually as an arm of the Government" and, thus, not an instrumentality. Id., 411 U.S. at 153. The Court refused to resurrect the expansive instrumentality doctrine has

been rejected consistently. Id., 411 U.S. at 155. Thus, in Moe, the Court again refused to expand the doctrine saying that the doctrine, as applied to Indian tribes, could, by itself, avoid the jurisdictional bar of 28 U.S.C. Section 1341. Id., 425 U.S. at 471-72.

This Court specifically declined to address the question of an individual Indian's ability to avoid the bar of the Tax Injunction Act. Id., 425 U.S. at 475, n.14. Petitioners believe that this Court's proceeding to the merits of the case as applied to the Tribe means that individual Indians can, like a Tribe, avoid the bar of the Tax Injunction Act. But that was not this Court's conclusion.

After finding that the "federal instrumentality" doctrine alone will not circumvent the bar of Section 1341, this Court went on to discuss the relationship of the Tax Injunction Act to 28 U.S.C. Section 1362, a jurisdictional statute directed to Indian tribes. The Court found that in Section 1362, Congress intended the Tribes to have the same access to the federal courts in asserting the Tribe's claims as the United States could as the trustee for the Tribe. Id., 425 U.S. at 472-73. Congress wanted the Tribes to have the ability to bring a suit even if the United States decided, for whatever reason, not to bring an action. Id., 425 U.S. at 472-73. In other words, Congress intended to codify the

instrumentality doctrine for Indian tribes and have the tribes "stand in the shoes" of the United States. Consequently, since the Tax Injunction Act did not bar the United States from bringing suit against a state, this Court concluded that, with the Tribes in the same shoes as the United States, Section 1341 did not bar a Tribe from bringing a suit against a state or local official concerning a state tax in a federal court. 5/

5/ 28 U.S.C. 1362 provides original jurisdiction in the federal courts for Indian tribes. Nothing contained in that law speaks to the jurisdiction of the federal courts over the actions of individual Indians or that individual Indians has jurisdictional right equal to that of the Indian tribes.

In conclusion, the decision of the Court of Appeals below is not in conflict with any portion of this Court's decision in Moe.

2. THE DECISION OF THE COURT OF APPEALS IS NOT IN CONFLICT WITH THE DECISION IN OMAHA TRIBE OF INDIANS V. PETERS

The Petitioners also assert that the decision of the Court of Appeals below is inconsistent with the decision of the Eighth Circuit Court of Appeals in Omaha Tribe of Indians v. Peters, 516 F.2d 133 (8th Cir. 1975), vacated and remanded, 427 U.S. 902 (1976). 6/ Petitioners are

6/ Vacated and remanded for further consideration in light of Bryan v. Itasca County, 426 U.S. 373 (1976). Id., 427 U.S. at 902.

incorrect in this assertion as well. 7/

Peters was a case brought by the Omaha, Santee Sioux and Winnebago Indian tribes against the State of Nebraska before this Court's opinion in Moe was rendered. The question of the Tax Injunction Act's application was addressed by the court of appeals in light of the parties before that court. The court

7/ The Petitioners also argue that the decision of the Court of Appeals is in conflict with the case of Dodge v. United States, 362 F.2d 810 (Ct.Cl. 1966). However, that case has absolutely nothing in common with this case. Dodge was concerned with refunds of income taxes held by the United States Internal Revenue Service. The question of state taxation, the Tax Injunction Act or 28 U.S.C 1362 were not before that court. The jurisdictional question of whether a state or federal court would hear the matter was nonexistent since a suit against an agency of the United States government could only be brought in a federal court.

ruled that the instrumentality doctrine applied in the case, relying upon two earlier decisions of the Ninth Circuit, Agua Caliente Band v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972) and Moses v. Kinnear, 490 F.2d 21 (9th Cir. 1974). The Peters court found an exception to the Tax Injunction Act that permitted the federal court to hear the case. The court decided that since it believed that the United State Government could have, as a co-plaintiff, brought the action against Nebraska, the Tribes could also have brought the case in federal court. Peters, 516 F.2d at 136.

However, the ruling in Peters is quite questionable if it is intended by the

Petitioners to be used in comparison with the decision of the Eleventh Circuit Court of Appeals below. First, the case against Nebraska in Peters was brought by Indian tribes, not individual Indians alone. The question of the applicability of the Tax Injunction Act to individual Indians never arose in that case as an issue to be decided and no decision on that question was rendered by the court of appeals on that point. Any judicial comments to individual Indians being able, under the "co-plaintiff" doctrine, to avoid the jurisdictional bar of the Tax Injunction Act are pure dicta. Nor was the question of 28 U.S.C. Section 1362's effect on the Tax Injunction Act before that court.

Secondly, the two cases relied upon by the Peters court, Moses and Agua Caliente, were also brought by tribes, not individual Indians alone. Specifically, the Moses court found federal jurisdiction under 28 U.S.C. 1362 and that Section 1362 jurisdiction was not defeated by the Tax Injunction Act. Moses, 490 F.2d at 25.

Thirdly, the two cases relied upon by the Peters court, Moses and Agua Caliente, have been ignored by the Ninth Circuit itself in cases concerning individual

Indians. 8/ The Ninth Circuit first faced the question of the Tax Injunction Act's effect on a suit brought by an individual Indian, or a non-tribal entity, without a tribe also being a party in Navajo Tribal Utility v. Arizona Department of Revenue, 608 F.2d 1228 (9th Cir. 1979). In that case, Arizona had imposed taxes on the Utility. The district court had dismissed the action finding that the Utility was barred by the Tax Injunction Act to bring the action in federal court. The Ninth

8/ While not a direct issue before the court in Moses, the Ninth Circuit, in its discussion of 28 U.S.C. Sections 1341 and 1362, noted that Section 1362 did not confer jurisdiction in the federal court on the individual claims of Mr. Moses, relying on its earlier decision in Quinault Tribe of Indians v. Gallagher, 368 F.2d 648, 656 (9th Cir. 1966). Moses, 490 F.2d at 25 n.10.

Circuit affirmed the lower court's decision finding that the Utility was not a "tribe" and, therefore, not entitled to the protection of Section 1362 because Section 1362 applied only to a "tribe" and not to "individual members of Indian tribes or bands." Id., 608 F.2d at 1231. In so deciding, the court addressed the co-plaintiff/instrumentality doctrine discussed in the earlier case of Agua Caliente and Moses. Relying on Moe, the court turned away from the instrumentality defense standing alone and decided that only in connection with Section 1362 could the co-plaintiff doctrine be utilized.

Id., 608 F.2d at 1234. 9/

Next, the Ninth Circuit directly faced the question of a case by an individual Indian in Dillon v. State of Montana, 634 F.2d 463 (9th Cir. 1980). In Dillon, the court was faced with the question of whether Mr. Dillon, as an individual Indian, had standing in federal court to contest Montana's income tax on him because he did not reside on the reservation. Again, the court rejected an individual Indian's use of the co-plaintiff doctrine without a tribe present in the litigation, Id., at 469, and restated that 28 U.S.C. Section 1362 did

9/ The court went so far as to say in dicta that, absent Section 1362, even a tribe could not rely upon the co-plaintiff doctrine after the Moe decision. Id.

not apply to individual Indians, Id., at 469. 10/

Lastly, the Eighth Circuit itself has ruled that individual Indians, without tribes as parties with them, cannot avoid the bar of the Tax Injunction Act because Section 1362 is not applicable to suits brought by individual Indians. Wardle v. Northwest Investment Co., 830 F.2d 118, 121 (8th Cir 1987).

Therefore, the Petitioners' argument of conflict cannot withstand the test of comparison for all the other courts of

10/ The Ninth Circuit has remained consistent ever since; an individual Indian cannot use the co-plaintiff doctrine and 28 U.S.C. Section 1362 does not permit an exception to the Tax Injunction Act when a case is brought by an individual Indian. See, Comenout v. State of Washington, 722 F.2d 574, 577 (9th Cir. 1983).

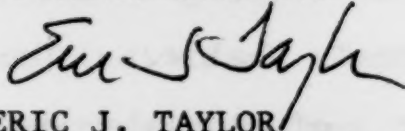
appeals addressing the very question posed to the Eleventh Circuit Court of Appeals reached the same conclusion as did the Court of Appeals below. The Eleventh Circuit Court of Appeals decision is consistent with all the others.

CONCLUSION

For the reasons given above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL
STATE OF FLORIDA



ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL
(Counsel of Record)

JOSEPH C. MELLICHAMP, III
SENIOR ASSISTANT ATTORNEY GENERAL

Office of the Attorney General
State of Florida
The Capitol, Tax Section
Tallahassee, Florida 32399-1050
(904) 487-2142

Attorneys for Respondent, Florida
Department of Revenue

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